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Supreme Court, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1449

IN THE

Supreme Court of the United States

October Term, 1988

KOREAN AIR LINES,

Petitioner

v.

THOMAS V. MACNAMARA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF PLAINTIFF-RESPONDENT THOMAS V. MacNAMARA

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1988

QUESTION PRESENTED

Whether the Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of Korea and Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 can be construed in a manner that would preserve for an American employee terminated by a Korean corporation from a job in the United States the rights and remedies provided by the United States' anti-discrimination laws for intentional discrimination in an action which alleges that said termination occurred as a result of discrimination on the basis of race, age, and/or national origin?

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TREATY, STATUTES AND REGULATIONS INVOLVED

1. Article VIII(1) of the Treaty of Friendship, Commerce, and Navigation, between the United States and the Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 (1957) provides in relevant part (8 U.S.T. at 2223):

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

2. Respondent is satisfied with Petitioner's statement of the statutes and regulations involved, and pursuant to S.Ct.R. 34.2 does not include a separate statement thereof.

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THOMAS V. MACNAMARA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF PLAINTIFF- RESPONDENT THOMAS V. MacNAMARA

Thomas V. MacNamara files this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit pursuant to the request of this Court.

STATEMENT OF THE CASE

Petitioner, Thomas V. MacNamara ("MacNamara") is a white American citizen who was employed beginning in August 1974 by Korean Air Lines ("KAL"), defendant below, a Korean Corporation which operates branch offices in the United States. During the course of his employment, MacNamara held several positions. From December 1977 until June 15, 1982, the date of his termination, he was a District Sales Manager based in Philadelphia. At the time of his termination, MacNamara was age 57 and was replaced by a 42 year old Korean national who entered the United States pursuant to an E-1 treaty trader visa. At or around the time of his termination, MacNamara alleges KAL replaced other white district sales managers at its branch offices in the United States and replaced them with Korean nationals under the age of 50.

After exhausting his administrative remedies, MacNamara filed suit against KAL on November 15, 1982. The Complaint alleged that MacNamara was dismissed by KAL for reasons constituting age discrimination in violation of the Age Discrimination in Employment Act, as amended ("ADEA"), 29 U.S.C. §621 *et. seq.*, and race and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e, *et. seq.* Additionally, it was alleged that MacNamara's discharge by KAL was in violation of the Employment Retirement Income Security Act, 29 U.S.C. §1001, *et. seq.* The District Court's jurisdiction was also invoked under 28 U.S.C. §1331.

KAL moved to dismiss the Complaint under Fed. R.Civ.P. 12(b)(6) on the basis of Article VIII(1) of the Korean Friendship, Commerce, and Navigation Treaty ("Korean FCN Treaty") 8 U.S.T. 2217, 2223, T.I.A.S. No. 3947.

The District Court considered KAL's motion to dismiss as one for summary judgment pursuant to Rule 56.

In its Opinion entered November 9, 1987, the District Court granted summary judgment in favor of KAL, holding that the Korean FCN Treaty gave KAL an unfettered right to engage essential personnel of its choice without regard to domestic employment laws. (A-36).[1] Further, the District Court determined that MacNamara was an executive for purposes of the Korean FCN Treaty and that therefore his termination was shielded by the provisions of the Korean FCN Treaty. (A-38, A-42).

MacNamara then appealed this matter to the United States Court of Appeals for the Third Circuit. On appeal, the Third Circuit reversed. The Third Circuit held that Article VIII(1) was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select their own nationals as managers because of their citizenship. (A-9). The Third Circuit concluded that insofar as Title VII and the ADEA proscribed intentional discrimination on the basis of race, national origin, and age, the court perceived no theoretical or practical conflict between them and the right conferred by Article VIII(1) of the Korean FCN Treaty. (A-9). The Third Circuit then went on to note that to the extent that Title VII and the ADEA proscribed personnel decisions based on citizenship solely because of their disparate impact on older managers, a particular racial group, or persons whose ancestors are not from the foreign country involved, a potential conflict existed between those laws and the Korean FCN Treaty which must be resolved in favor of the Treaty. (A-9).

The Court of Appeals also determined that the right to "engage" executives of its choice pursuant to the Korean FCN Treaty included both KAL's decision to fire

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1. References herein to items contained in the Appendix of KAL's Petition for a Writ of Certiorari will be cited as "(A -)".

MacNamara and the reassignment of his duties to a Korean national. (A-10). The Court held that the issue of MacNamara's status as an "executive" was not the appropriate inquiry, instead, the status of his replacement was the relevant inquiry. (A-11). Since MacNamara's replacement, Mr. Chung, entered the United States pursuant to an E-1 treaty trader visa and was regional manager for the territory from Pennsylvania to Florida, Mr. Chung was determined by the court to be an executive for the purposes of Article VIII(1) of the Korean FCN Treaty. (A-12).

The Third Circuit remanded the case for further proceedings consistent with its Opinion. On March 3, 1989, KAL filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit with this Court arguing that the Third Circuit's decision should be reversed because KAL was immune under the Korean FCN Treaty from any action challenging its employment decisions pursuant to the anti-discrimination laws of the United States. MacNamara's Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit was docketed in this Court on March 20, 1989. (*Thomas V. MacNamara v. Korean Airlines*, No. 88-1551). It was argued therein that the Third Circuit decision should be reversed because MacNamara was entitled to all rights and remedies granted by the United States' anti-discrimination laws without regard to the provisions of the Korean FCN Treaty.

ARGUMENT

The United States Court of Appeals for the Third Circuit has constructed a framework whereby the anti-discrimination protections granted to employees by Title VII and the ADEA can be reconciled with the freedom of choice granted to foreign employers by Article VIII(1) of the Korean FCN Treaty to employ their own nationals as

managers because of their citizenship. This balance is achieved by examining the purposes and goals of the anti-discrimination laws and the Korean FCN Treaty.[2] Title VII and the ADEA grant employees protection from having employment decisions based on six specific grounds — race, color, religion, sex, national origin, and age. Article VIII(1) of the Korean FCN Treaty states, in pertinent part, that "nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel . . . of their choice."

The appellate court concluded[3] that the "of their

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2. MacNamara has filed a Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. (*Thomas V. MacNamara v. Korean Airlines*, No. 88-1551). In his Cross-Petition, MacNamara has argued that the Third Circuit's interpretation of the anti-discrimination laws *vis-a-vis* the Korean FCN Treaty is too restrictive, and that he should be permitted to present evidence relating to disparate impact discrimination in addition to presenting a case relating to disparate treatment. This brief is being filed at the request of the Court in response to KAL's position in its Petition for a Writ of Certiorari that the Third Circuit's decision should be reversed because no cause of action under the Title VII and the ADEA should be permitted. MacNamara does not waive his argument as set forth in the Cross-Petition, but is presenting herein his position that, in the event that this Court does not grant his Cross-Petition, the Court should uphold the Third Circuit's ruling which at least maintains a portion of the protection granted to workers by the anti-discrimination laws of the United States.

3. This is also the conclusion of the Sixth Circuit Court of Appeals in *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984). In addition to the Third and Sixth Circuits, the Second and Fifth Circuits have considered the issue of what balance to strike between provisions similar to those in Article VIII(1) and the anti-discrimination laws. In *Avagliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2nd Cir. 1981), *vacated on other grounds and remanded*, 457 U.S. 176, 102 S.Ct. 2374 (1982), this Court held that FCN Treaty privileges do not apply to American subsidiaries of foreign businesses and those subsidiaries are subject to all domestic

(footnote continued on next page)

choice" language is limited by the context of the Korean FCN Treaty. This limitation is that Article VIII(1) is "not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select one's own nationals as managers *because of their citizenship.*" (A-9, emphasis original). The Third Circuit recognized that pursuant to the Korean FCN Treaty, foreign corporations could make employment decisions based on citizenship, and that the anti-discrimination laws did not prohibit employment decisions based upon citizenship. Thus, where the employment decision was based solely upon citizenship any conflict created between the anti-discrimination laws and the Korean FCN Treaty would be one in which the Korean FCN Treaty would have to prevail. On the other hand, if the employment decision was one based on race, national origin or age, there was nothing in the Korean FCN Treaty to prevent an employee from asserting a claim under the anti-discrimination laws.

(footnote continued from preceeding page)
laws without regard to the FCN Treaties. The Second Circuit, which incorrectly determined that the American subsidiary of a Japanese company was afforded protection by the Japanese FCN Treaty, held that citizenship could be a bona fide occupational qualification pursuant to Title VII where the employment of a company's own nationals is reasonably necessary to the successful operation of the business. *Avagliano, supra* at 559. Thus, Article VIII(1) and Title VII can be read to involve no conflict. The Fifth Circuit in *Spiess v. C. Itoh & Co., Inc.*, 643 F.2d 333 (5th Cir. 1981), also improperly applied Article VIII(1) of the Japanese FCN Treaty to a domestic subsidiary of a Japanese company. Nevertheless, it held that Article VIII(1) fully insulated the company from domestic anti-discrimination laws. The *Spiess* Court ruled that the Japanese FCN Treaty provided a complete defense. The "absolute language of Article VIII(1) fully insulated the company from the domestic anti-discrimination laws with respect to the hiring of executives." (A-5). Thus, the Fifth Circuit is in complete conflict with the other circuit courts of appeals.

The foundation upon which the balanced approach of the Third Circuit was based was this Court's observation that the purpose of the FCN Treaties:

> . . . was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis [with domestic companies] without suffering discrimination based on their alienage.

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 187-188.

The Third Circuit recognized that the FCN Treaties were designed to promote the policy of equality and hospitality. "This means above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with the citizens of the [host] country." (A-13, quoting Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am.J.Comp.L. 229, 230 (1956)).[4] This perspective was refined by the understanding that the FCN Treaties were designed to restrict the host country from enacting laws requiring that foreign businesses hire employees from the local workforce. (A-16). The concern being addressed by the FCN Treaties was the imposition of percentile quotas. Consequently, the "of their choice" language is interpreted to allow the foreign company the same access to its own citizens as the host country's companies have to its citizens. (A-16). The Third Circuit read Article VIII(1) and its history to "indicate that the negotiators understood that employment decisions regarding personnel described in Article

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4. The District Court noted in its footnote 7 that this Court acknowledged Walker's status as Advisor on Commercial Treaties at the State Department and that the Department recognized him as being responsible for formulating the general structure of the postwar FCN Treaties,, *Sumitomo, supra*, 457 U.S. at 181, n.6. (A-14).

VIII(1) would be free of domestic laws utilizing citizenship as a criterion, but would be subject generally to other legally imposed criteria." (A-16).

Furthermore, the determination that Article VIII(1) of the Korean FCN Treaty does not result in unfettered decision making ability is supported by the second sentence of Article VIII(1) which permits the use of accountants and other technical experts without regard to whether they meet the professional qualifications established by the host country. The Third Circuit noted:

> If the first sentence had been intended to give a foreign employer the right to engage a citizen of its own country without regard to domestic laws that would otherwise impinge on that decision, the second sentence would have been unnecessary. Its presence suggests that the negotiators intended a foreign employer's decision to be unaffected by laws that discriminated on the basis of citizenship but nevertheless be subject to other domestic laws, excepting only those specifying professional qualifications.

(A-18).

Thus, the court concluded that the text of the Korean FCN Treaty and the negotiation histories of the FCN Treaties indicated that:

> . . . as far as American negotiators were concerned, in order to assure American investors of the right to hire qualified Americans in executive positions, and thus to overcome local legislation precluding that right, Article VIII(1) had to be drafted in absolute terms. Yet, that absolute language was intended to confer no greater right than an employer's freedom to choose the nationality of its executive labor pool.

(A-20). It was these considerations, the Third Circuit emphasized, that prompted this Court's observation in *Sumitomo* that the purpose of the Korean FCN Treaty language was not to give foreign corporations advantages over domestic enterprises, but rather to free them from "discrimination based on their alienage." (A-20, *citing, Sumitomo, supra*, 457 U.S. at 187-188). Therefore, Article VIII(1) of the Korean FCN Treaty protects the right of foreign employers' access to their own nationals just as domestic employers have access to their nationals. However, just as domestic corporations must abide by the anti-discrimination laws where intentional discrimination is involved, to be consistent with this Court's observation in *Sumitomo*, foreign corporations must also comply with such laws so as not to have an improper advantage over domestic corporations. It is for this reason that the Third Circuit properly concluded that MacNamara's disparate treatment claims could go forward. (A-23).

However, the court's analysis of the relationship between Article VIII(1) of the Korean FCN Treaty did not end at this point. The Third Circuit was concerned that allowing disparate impact proceedings would improperly intrude on protected Article VIII(1) employment decisions based on citizenship. In order to achieve a reconciliation of Article VIII(1) of the Korean FCN Treaty and the anti-discrimination laws, the Third Circuit would not allow MacNamara to proceed on a disparate impact theory.

The court concluded that since "empirical evidence can satisfy the subjective standard of liability" in disparate impact cases, companies "hailing from countries, including perhaps Korea, whose populations are largely homogenous" are at a substantial disadvantage in disparate impact cases. (A-18-A-19). This results from the fact that in a homogenous society the distinctions between race, national origin and citizenship become blurred, if they do not disappear completely. Thus, in the

case of a company from a homogenous society, the exercise of citizenship preference pursuant to Article VIII(1) rights might necessarily create a violation of Title VII's prohibition against race and national origin discrimination. (A-19). According to the Third Circuit, this result would lead to an impermissible conflict between the Korean FCN Treaty and Title VII. (A-25). In such an event, the Third Circuit determined that the Korean FCN Treaty would prevail. (A-21, *citing, McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Spiess, supra* at 356.) Thus, MacNamara was not permitted to proceed on a disparate impact theory. The Third Circuit's approach removed any conflict between Article VIII(1) and the anti-discrimination laws and achieved an appropriate balance of MacNamara's rights as an employee and KAL's rights pursuant to the Korean FCN Treaty.[5]

KAL argued that *certiorari* should be granted because, *inter alia*, there is a conflict between the interpretation of the Korean FCN Treaty by the government of the United States and the government of the Republic of Korea. The Third Circuit, without discussion, found no conflict. (A-21, n. 13). This conclusion is correct. The Republic of Korea's analysis started with the assumption that there was a conflict between the Korean FCN Treaty and the anti-discrimination laws of the United States and did not address any reconciliation between the two. The United States government, on the other

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5. This is particularly true because the Third Circuit's requirement set forth in its footnote 15 that in a mixed motive case the plaintiff must demonstrate "but for" the discrimination the employment decision would have been different, is no longer the proper standard. (A-23). As a result of this Court's recent ruling, *Price Waterhouse v. Ann B. Hopkins*, U.S. , 57 U.S.L.W. 4469 (May 1, 1989), once the plaintiff has set forth a *prima facie* case establishing that improper motives played a significant role in the employment decision, the defendant then must demonstrate that "its legitimate reason, standing alone, would have induced it to make the same decision." *Hopkins, supra* at 4476.

hand, analyzed the Korean FCN Treaty and the anti-discrimination laws and determined that no conflict was presented where the discrimination was based on criteria other than citizenship. (A-20-A-21). Where citizenship as a criterion for discrimination was involved, both governments agreed that the Treaty would prevail. Because the Korean government did not address the reconciliation issue, the Third Circuit could properly determine that no conflict appeared in the record before it.

KAL raised the specter of the horrific economic consequences if foreign companies are required to comply with legally enacted anti-discrimination laws. The Third Circuit acknowledged this concern, but concluded that since domestic corporations are faced with the burden of defending personnel decisions and this "is a fact of business life in contemporary America," it was appropriate for their foreign competitors to face this issue as well. This was consistent with the Court's observation in *Sumitomo* that one should not be favored over another. 457 U.S. at 187-188. The court also recognized that although factfinders "can and do err from time to time," there was no reason to believe that this would occur more frequently in cases of this type. (A-23).

Under the foregoing circumstances, given the balanced approach taken by the Third Circuit, KAL has not articulated any persuasive reason for this Court to review the decision of the Third Circuit for the purpose of determining whether MacNamara's right to proceed against KAL pursuant to the anti-discrimination laws should be eliminated totally.

CONCLUSION

For the reasons set forth above, Thomas V. MacNamara respectfully requests that this Court deny Korean Air Lines' Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT D. GREENBAUM, hereby certify that three copies Respondent's Brief in Opposition To Petition For a Writ of Certiorari were served by first class mail, postage prepaid this 31st day of May, 1989 to the following:

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